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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

To: The Commission

REQUEST BY SINCLAIR BROADCAST GROUP, INC. FOR STAY

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Dated: September 3, 2002

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Summary

Sinclair Broadcast Group, Inc. ("Sinclair" or the "Company") respectfully requests that the Commission grant a stay extending the time for the Company to comply with the requirement that it terminate local marketing agreements in certain markets. Consistent with relief granted to other parties in similar circumstances, Sinclair requests a stay until 12 months after a final decision by the Commission pursuant to the remand ordered by the United States Court of Appeals for the District of Columbia Circuit (the "Court") in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (2002). Sinclair is filing this request in the event that the Court terminates its current stay of the Commission's TV duopoly rule or the Commission takes the position that the Court imposed stay is no longer effective now that the Court's mandate has issued.

Grant of the requested stay is consistent with, indeed required by, the Commission's treatment of similarly situated parties, Viacom, Inc. and Fox Television Stations, Inc., who were granted 12 months to divest certain interests once the FCC's review of certain media ownership regulations is completed and its ownership rules are no longer subject to judicial review. Moreover, absent a stay, Sinclair will suffer irreparable injury from a forced divestiture as a result of enforcement of the discredited rule. Sinclair has invested millions of dollars in the stations and the value of its investments and goodwill will be dramatically reduced. The Company will not be able to recoup these losses or to reenter the relationships when the duopoly rule is eliminated or modified. Sinclair has already prevailed on the merits of its challenge to the Commission's TV duopoly rule, and accordingly, the Commission should not seek to enforce its arbitrary and capricious rule until it has complied with the Court's remand order. Grant of a stay will cause no harm to other parties and is in the public interest. As a result, the Commission should grant the requested relief.

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REQUEST BY SINCLAIR BROADCAST GROUP, INC. FOR STAY

I. INTRODUCTION

Sinclair Broadcast Group, Inc. ("Sinclair" or the "Company"), by its attorneys and pursuant to Section 1.43 of the Commission's rules, respectfully requests that the Commission grant a stay extending the time for the Company to comply with the requirement that it terminate local marketing agreements ("LMAs") in Columbus, Ohio, Dayton, Ohio, Charleston, South Carolina, and Charleston, West Virginia (collectively, the "four LMAs") until 12 months after a final decision by the FCC pursuant to the remand ordered by the United States Court of Appeals for the District of Columbia Circuit (the "Court") in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (2002) (the "Appeal").

Sinclair is filing this stay request out of an abundance of caution. Although the Court has issued its mandate in the Appeal, the Court has *not* terminated the stay that it granted Sinclair on June 20, 2001. The Court's Order of that date stayed the time for Sinclair to come into compliance with the "eight voices standard" as elucidated in *Report and Order,* 14 FCC Rcd

12903, 12926, 12932-33 ¶¶ 47, 64 (Aug. 6, 1999) "pending further order of the court." Sinclair is filing this motion in the event that the Court terminates the stay or the Commission takes the position that the Court imposed stay is no longer effective now that the mandate has issued. Continuance of the stay is consistent with the Court's orders in the Appeal, and will protect the Company from the irreparable harm that would result from any forced divestiture prior to Commission completion of its review of the ownership regulations governing these LMAs.

Grant of Sinclair's request will also preserve the *status quo* while the Commission complies with the Court's remand instructions to review the duopoly rule that mandates divestiture, and will prevent the irreparable injury that would result from termination of Sinclair's LMAs, under a rule held arbitrary and capricious and remanded for review, before the Commission has complied with the Court's mandate. Grant of such relief will cause no harm to other parties or to the public interest and is consistent with the Commission's treatment of similarly situated Viacom, Inc. ("Viacom") and Fox Television Stations, Inc. ("Fox"). *In the Matter of 1998 Biennial Regulatory Review*, Memorandum Opinion and Order, MM Docket 98-35, FCC 02-98 (rel. Mar. 28, 2002) (granting 12-months of relief to Viacom to divest certain interests once the FCC's review of media ownership regulations is complete and its ownership rules are no longer subject to judicial review); *Fox Television Stations, Inc.*, 16 FCC Rcd 14975 (2001) at ¶48 (granting similar relief). Indeed, the facts of Sinclair's case are even more compelling than the facts presented by Fox and Viacom, as both of those parties entered into arrangements violating a well-known and well-established rule, while Sinclair's business arrangement was wholly permissible. By granting Sinclair a stay, the Commission will merely comply with its obligation to ensure similar treatment for similarly situated parties.

II. BACKGROUND

On April 2, 2002, the United States Court of Appeals for the District of Columbia Circuit held that the FCC's method for evaluating common ownership and/or control of television stations in the same market, as codified at 47 C.F.R. Section 73.3555(b) (the "Rule"),[1] was arbitrary and capricious because "the Commission has failed to demonstrate that its exclusion of non-broadcast media in the eight voices standard was justified by the evidence before it. *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d at 152 (citing *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983)). The Court noted that the Commission counted non-broadcast media voices under the radio-television cross ownership provisions,[2] even though it refused to count them under the Rule. *Id.* at 164. The Court held that this unexplained distinction not only failed to meet the basic requirements of administrative law, but violated a direct statutory instruction that the Commission either explain fully why media ownership regulations, including the Rule, are "'necessary in the public interest'" or eliminate them. Section 202(h) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) ("Section 202(h)"). The Court found that the Commission had failed to rebut a presumption in Section 202(h) "in favor of repealing or modifying the ownership rules," that was "designed to continue the process of deregulation." As a result, the court remanded the local ownership rule to the Commission for further consideration. *Sinclair Broadcast Group, Inc.*, 284 F.3d at 152.

On August 28, 2002, the Court issued its mandate to the Commission.

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[1] The present Rule, as adopted in August 1999, effectively bars one television station in a Designated Market Area ("DMA") from programming, pursuant to an LMA, another television station with an overlapping Grade B contour in the same DMA unless (a) at least eight independently owned and operating full-power television stations remain in the DMA following the proposed agreement; and (b) at least one of the two stations in question is not among the top four-ranked stations in the market.

[2] 47 C.F.R. Section 73.3555(c)

A. History of the Proceeding

In 1964, the Commission adopted a rule prohibiting the common ownership of two television stations whose Grade B contours overlapped. Previously, the Commission's rules generally prohibited the common ownership of television stations serving "substantially the same area."[3] The Commission based this so-called "TV duopoly rule" on its twin goals of "promot[ing] maximum diversification of program and service viewpoints" and "prevent[ing] undue concentration of economic power."[4] Significantly, however, the Commission offered no empirical evidence that its rule would accomplish these goals, basing the rule instead on what it deemed to be "reasonable assumptions" that a single person or group can have "an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."[5]

It should be noted that, despite the duopoly rules, the Commission repeatedly approved the use of local marketing agreements.[6] The Commission's public record contains ample support that LMAs are in the public interest. As a result, Sinclair and numerous parties to other LMAs reasonably structured their business arrangements relying on the Commission's affirmative policy supporting the creation of LMAs.

In 1991, recognizing the dramatic technological and competitive changes that had taken place in the video marketplace in the previous 25 years, the Commission launched this

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3 *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations,* 45 FCC 1476 at n. 1 (1964).

4 *Id.* at ¶ 2.

5 *Id.* at ¶ 3 (emphasis added, citation omitted).

6 *See, e.g., Siete Grande Television, Inc.,* 11 FCC Rcd 21154, 21156 (MMB 1996), *WGPR, Inc.*, 10 FCC Rcd 8140 (1995); *Gisela Huberman Esquire*, 6 FCC Rcd 5397 (MMB 1991); *J. Dominic Monohan, Esquire*, 6 FCC Rcd 1867 (MMB 1991); *Peter D. O'Connell Esquire*, 6 FCC Rcd 1869 (MMB 1991); *Brian M. Madden, Esquire*, 6 FCC Rcd 1871 (MMB 1991). *See also*, Letter from Barbara Kreisman, Chief Video Services Division, Mass Media Bureau, to WLOS Licensee, Inc., *et al.* (June 27, 1997).

proceeding. The Commission noted that the "expansion in the availability of outlets and programming has markedly reduced the audience shares of the broadcast networks and their affiliates."[7] In essence, the television ownership proceeding was intended to be a forward-looking deregulatory initiative in recognition of a dramatically changing media environment.

During an eight-year rule making proceeding, numerous participants submitted detailed studies of existing same market TV/LMA combinations and other empirical evidence documenting the important public interest benefits of television combinations in smaller markets.[8] While the proceeding was taking place, Congress addressed LMAs in Section 202(g) of the 1996 Act. The Conference Report accompanying the Act noted the positive contributions of television LMAs.[9]

In the face of such evidence, the Commission acknowledged that "[t]he record reflects that there has been an increase in the number and types of media outlets available to local communities,"[10] as well as that there are clear benefits from the efficiencies that such arrangements as LMAs create including "increased news and public affairs programming and improved entertainment programming, and, in some cases . . . the continued survival of a struggling station."[11] Despite this evidence and the legislative history of the 1996 Act, however,

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7 *See Policy Implications of the Changing Video Marketplace, Notice of Inquiry,* 6 FCC Rcd 4961 at ¶¶ 3-4 (1991) (citation omitted).

8 *See, e.g.,* Local Marketing Agreements and the Public Interest: A Supplemental Report, May 1998, submitted by Association of Local Television Stations ("ALTV"); Local Marketing Agreements and the Public Interest, attached to Reply Comments of ALTV filed March 21, 1997; Comments of Pegasus Communications Corporation, filed February 10, 1997; Consolidated Comments of Sinclair Broadcast Group, Inc., MM Docket Nos. 91-221 and 94-150, filed February 7, 1997.

9 S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163,164 (1996).

10 *Review of the Commission's Regulations Governing Television Broadcasting,* 14 FCC Rcd 12903 (1999) ("*Local Ownership Order*") at ¶¶ 7, 37, *on recon.,* FCC 00-431 (rel. Jan. 19, 2001) ("*Local Ownership Reconsideration Order*").

11 *Local Ownership Order* at ¶ 57 (citations omitted).

the Commission concluded that only what it termed "measured relaxation" of the TV duopoly rule was appropriate due to the supposed "important diversity and competition issues at stake" as well as the "rapid change and increasing consolidation" taking place in the communications industry.

In a companion proceeding decided the same day, the Commission determined that a television licensee that owned one station and provided programming to another station in the same market pursuant to an LMA would be treated as if it owned both stations for purposes of the multiple ownership rules, including the TV duopoly rule.[12] The Commission ordered that whenever a combination of stations would violate the new "eight voices standard," those programming a station pursuant to an attributable LMA must terminate the LMAs or divest the owned stations until their combined holdings met the eight voices standard. The compliance deadline was August 6, 2001. This regulation applied to any LMAs entered into on or after the adoption date of the *Second Further Notice of Proposed Rule Making* in this proceeding, November 5, 1996.

B. The Status of Sinclair's LMAs and Pending Commission Action on Remand

The Commission is now conducting an omnibus review involving all of its media ownership rules,[13] as required in part by the Court's decision in the Appeal and other recent rulings.[14] The Chief of the Mass Media Bureau, W. Kenneth Ferree, stated at a June 17 press

12 *See Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests,* 14 FCC Rcd 12559 (1999).

13 *See* W. Kenneth Ferree, Chief, Media Bureau, 2002 Media Ownership Rules Awards, Address Before the National Association of Broadcasters / American Bar Association / Federal Communications Bar Association Seminar (Apr. 7, 2002), text available at <http://www.fcc.gov/mb/NABlunch.txt>.

14 *See, e.g., Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002).

conference that the various ownership limitation rules are "kissing cousins" that depend on many of the same facts and many of the same values of "localism" and "diversity," and said that it "just makes sense to do them all at once" on the basis of a supposed standard to be developed to measure "diversity" in all the relevant industries for purposes of all the rules.[15] Thus, the operational officials of the FCC concede that any rational duopoly rule must await an attempt to provide a whole new theory about the various media markets to justify *any* ownership limitations. It should be noted that these "kissing cousin" rules relate not only to broadcast television, but also to cable television, radio and newspaper ownership. The decision to treat all the rules together means that the FCC now effectively concedes that the "eight voices test," or any duopoly rule focusing only on broadcast television, is a hopeless cause.

The *Local Ownership Order* would have required termination of at least three of the four LMAs by August 6, 2001 because they would violate the "eight voices test."[16] Forced divestiture has been stayed, however, by the United States Court of Appeals for the D.C. Circuit.[17] Out of an abundance of caution, Sinclair now seeks a stay from the Commission to protect the Company from irreparable harm from any enforcement of the *Local Ownership Order* before the Commission completes its regulatory review and complies with both the Court's mandate and the statutory requirements of Section 202(h). Although the Commission should not in any case

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15 *See FCC Plans to Combine Reviews of Media-Ownership Rules*, Dow Jones Newswires, June 17, 2002.

16 An agreement establishing the WTTE(TV) LMA was reached well before the cutoff date for current enforcement of the rule, Nov. 5, 1996, and Sinclair was programming and selling advertising for WTTE(TV) prior to that date although the agreement was not formally signed until Nov. 5, 1996. Because Sinclair was already performing the time brokerage duties detailed in the written agreement, it had, by definition, entered into the LMA before the cutoff date. Sinclair's role under the WTTE(TV) LMA is, therefore, protected until 2004. The WTTE(TV) LMA is included in this request for a stay out of an abundance of caution.

17 *Sinclair Broadcast Group, Inc. v. FCC*, Stay Order in Case No. 01-1079 (D.C. Cir., Jun. 20, 2001).

initiate any enforcement of the Rule before the omnibus review is complete, the grant of a stay would assure all interested parties, including investors basing their decisions on the viability of LMAs, of the Commission's intentions during this interim period.

In light of the issuance of the Court's mandate and the Commission's related efforts to comprehensively revisit its media ownership rules, Sinclair now requests that the Commission stay the effectiveness of the required termination until 12 months after a final decision by the FCC on remand pursuant to the mandate issued by the Court[18] – just as it did for Viacom and Fox in similar circumstances.

III. ARGUMENT

In *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d at 166, the Court found that "it is not readily apparent" why the FCC would exclude non-broadcast media from "voice" counts under the Rule, when it does not do so to measure diversity under related regulations governing cross-ownership. Given the long procedural history here, it appears unlikely that the Commission could suddenly find evidence on the record to justify retaining the Rule in anything remotely resembling its current form when it has been unable to do so either during the decade preceding the Appeal or in its arguments before the Court during the Appeal. This is especially true given the "presumption in favor of repealing or modifying the ownership rules" in Section 202(h) that effectively limited the Commission's rule-making discretion in media ownership matters. *See id.* at 159 (citing *Fox Television Stations v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002)). Indeed, the Commission's operational officials have effectively conceded as much by undertaking an "omnibus" review to consider all the ownership rules together.

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18 Sinclair agrees with the definition of finality appearing in the Request of Viacom, Inc. for Interim Relief, MM Docket 98-35 (filed Feb. 25, 2002) at 2, n.4, under which "the term 'final' should be construed to mean that action shall have been taken by the FCC resolving the remand proceeding, and the decision is no longer subject to judicial review."

In the face of such regulatory uncertainty about what, if any, ownership limitations will be enacted, the Commission has granted similar stay-like interim relief, as noted, to Fox[19] and to Viacom.[20] This relief holds in abeyance the enforcement of ownership regulations that, like the Rule, are part and parcel of the Commission's omnibus review of ownership regulation. As the scope of the relief granted both to Fox and Viacom are identical to that sought now by Sinclair, the same administrative wisdom should apply here, as the Commission proceeds through its review of all media ownership regulations to effectively reform "the structure of our rules [that] today rests on foundational assumptions about the market that are, at best, questionable and, at worst, patently invalid."[21] Given these realities, the Commission should grant Sinclair the same level of relief that it granted Fox and Viacom, as the equities are alike. Indeed, the equities weigh even more heavily in favor of Sinclair's petition than it did for Fox and Viacom because these two entities were in violation of a well-known and well-rooted rule, while no regulation barred Sinclair's LMAs at the time the Company entered into them. *See* discussion on p.13, *infra.*

In determining whether a stay is warranted, the Commission considers the following: "(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal; (2) Has the petitioner shown that without such relief, it will be irreparably injured; (3) Would the issuance of a stay substantially harm other parties interested in the proceedings; and (4) Where lies the public interest?" *CBS Communications Services, Inc.*, 13 FCC Rcd 4471 (1998) at ¶7 (*citing Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

If these factors provide "sufficient support for a stay, a stay may be issued even if there is not a 'mathematical probability' the party seeking a stay would succeed on the merits, so long as

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19 *Fox Television Stations, Inc.*, 16 FCC Rcd 14975 (2001) at ¶48.

20 *In the Matter of 1998 Biennial Regulatory Review*, Memorandum Opinion and Order, MM Docket 98-35, FCC 02-98 (rel. Mar. 28, 2002).

21 Address by W. Kenneth Ferree, *supra* n.13.

the movant 'makes a substantial case on the merits.'" *Id.* (citing *Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)).

In addition, the facts in this case implicate rules of due process and simple fairness. It is well-established that the Commission must treat all similarly situated parties in a similar manner. *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). Because the Commission has granted other parties, namely Fox and Viacom, relief similar to the stay sought by Sinclair, and they are similarly situated, it must similarly grant such relief to Sinclair.

A. Sinclair is Similarly Situated to Other Parties Already Granted Similar Relief

As noted, both Fox and Viacom have been granted relief similar to the 12 month stay requested here by Sinclair. Their requests, like Sinclair's, arose after successful court challenges to the Commission's media ownership rules. Also, like Sinclair's requests, their requests are integrally related to the Commission's current omnibus review of media ownership restrictions – a process that arose as a result of the cases brought, respectively, by Sinclair and Fox, Viacom and other parties. Both cases turned, in large part, on the statutory mandates of Section 202(h). Given these vast commonalities, it is clear that Sinclair is similarly situated to Fox and Viacom.

The law recognizes the "importance of treating parties alike when . . . the agency vacillates without reason in its application of a statute or the implementing regulations." *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987). This means granting Sinclair relief similar to that given Fox and Viacom. As litigants in related cases, all arising from the Commission's failure to meet its mandate under Section 202(h), Sinclair, Fox and Viacom stand in essentially the same position. Insofar as the core issues are the same, there is no "persuasive factual distinction" that would be sufficient to "warrant disparate treatment." *Ramon Rodriguez*, 3 FCC Rcd 407 (1988) at ¶9. Even if any differences existed, they would be minor and technical and, therefore, the Commission should grant Sinclair the stay requested because the relief requested is just like the relief already granted to Fox and Viacom. *Melody Music v.* FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).

B. Sinclair Will Suffer Irreparable Injury From Enforcement of the Now-Discredited Rule, Absent a Stay

Absent a stay, Sinclair could be forced to terminate its four LMAs with television stations in the Columbus, Ohio; Dayton, Ohio; Charleston, South Carolina; and Charleston, West Virginia markets. Sinclair has invested millions of dollars in these stations to enable them to air quality programming, including local news and public affairs programs, and to improve their facilities. Sinclair has instituted these changes based on the expectation that it would realize a return on its investment over the long term in the form of significant economies of scale. Once its contractual relationships with these stations are terminated, however, the value of Sinclair's prior investment will be dramatically affected. Indeed, Sinclair will be *penalized* for its efforts to create effective additional voices in the market, in keeping with the public interest – and neither a court nor the Commission would be able to compensate Sinclair or the public for that loss. Nor could Sinclair expect to simply reenter the relationships or similar relationships with comparable stations in these markets should the TV duopoly rule ultimately be eliminated or modified to allow these arrangements; a station whose LMA is summarily cancelled would be forced to provide programming by other means – precluding Sinclair's further participation. *See* Declaration of David B. Amy attached hereto as Exhibit A (the "Amy Declaration").[22]

The ability to program a television station in a particular market is also a unique business opportunity. Each market and each television station within a market, with its particular audience reach and demographic niche, is unique. Given the limited number of licenses, such opportunities

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22 Sinclair has applications pending to acquire these four stations which, if granted, would make this stay request moot. Termination of the LMAs prior to action on the applications to acquire the stations would be particularly unfair given Sinclair's investment in programming and equipment pursuant to the LMA agreements.

are difficult to find and, therefore, irreplaceable in the ordinary course of business. *See* Amy Declaration.

Even if Sinclair could resume its existing relationships in the future, its loss, in the interim, of goodwill, market efficiencies, as well as its financial investments could not be recouped. The economic impact on Sinclair would be draconian should the Commission apply the eight voices standard *before* completion of the Commission's omnibus review of media ownership rules. The four LMAs to which Sinclair is a party have an initial term of at least five years with a five-year renewal. Sinclair determined that a ten-year period was necessary to recoup the expenses involved and provide the company with a reasonable rate of return on its investment. The uncertainty caused by the impending deadline has raised a number of concerns from investors, lenders and station personnel. The early termination of the four LMAs would deny Sinclair economic restitution for its investment in equipment and programming designed to enhance program diversity. *See* Amy Declaration.

As both the Commission and the courts have recognized, the forced withdrawal of a company from an important aspect of its business constitutes irreparable harm, even if the losses do not cause the company to go out of business. *WMATA v. Holiday Tours*, 559 F.2d at 843 (irreparable harm to tour operator found in the "destruction in its current form as a provider of bus tours," although the operator could have continued to provide limousine tours instead of bus tours); *CBS Communications Service., Inc.*, 13 FCC Rcd 4471 at ¶ 19 (1998) (irreparable harm found where wireless carrier would suffer substantial disruption of its business in one of its markets). As noted, the Commission recently granted relief from forced divestiture by Viacom and Fox pending finality of rules arising from the Commission's current omnibus review of its media ownership rules. The logic applied to Fox and Viacom's petitions should likewise apply to Sinclair.

Indeed, the facts of Sinclair's case are even more compelling than the facts presented by Fox and Viacom. Both Fox and Viacom received interim relief from enforcement of the 35% national cap on television ownership – a well-established rule that both understood before entering into transactions that violated them. By contrast, when Sinclair entered into the four LMAs, they were entirely permissible as no rule barred them. Sinclair made lawful business decisions based on the prior decisions of an expert agency.

Even though Sinclair would still own other outlets in these markets, it would suffer substantial disruption of its business operations in those markets. In this way, Sinclair is like the sightseeing company in *Holiday Tours* that was left with its limousine business but unable to realize any return from its substantial investment in buses. Just as tour buses and limousines serve different clientele, stations programmed pursuant to an LMA broadcast programming different from that appearing on Sinclair-owned stations in these same markets. This dual stream allows Sinclair to serve varied demographic groups. *See* Amy Declaration. Thus, forced termination of these relationships will destroy a significant part of Sinclair's business.

Moreover, Sinclair's business of programming stations is, at its core, speech. Therefore, any forced termination is especially harmful because it will silence Sinclair's speech on these stations. Even if Sinclair could later resume these four LMAs after the Commission's omnibus review, there is no remedy for timely speech not delivered at the appropriate moment. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citing *New York Times Co. v. U. S.*, 403 U.S. 713 (1971)); *see also Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988) (noting that "opportunities for speech," if suppressed, "are irretrievably lost"). While purely economic harms can be remedied later, an intangible harm – such as the placing of an administrative gag on speech – is the not kind of loss "for which 'adequate compensatory or other corrective relief will be available at a later date.'" *Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc.*, 559 F.2d at 843, n.2 (citing *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d at 925).

C. Sinclair Has Already Prevailed on the Merits; The Commission Must Not Initiate Enforcement Before Compliance with the Court's Remand Order

The Court explicitly agreed with Sinclair's analysis that the Rule is arbitrary and capricious because the Commission failed to justify it. *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d at 162. As the Court has noted, Section 202(h) carries "a presumption in favor of repealing or modifying the ownership rules," which Congress "designed to continue the process of deregulation." *Id.* at 152, 159. The Court's remand surely did not contemplate that the Commission would continue to enforce an arbitrary and capricious rule. The only open issue now is how the Commission will respond to the Court's remand, in light of this Congressional mandate, when it completes its omnibus review and retooling or elimination of the media ownership rules. Enforcement of the Rule now, while it undergoes a court-ordered review with a presumption of repeal or modification, would not comport with the Court's decision, and would take on the appearance of nothing more than an illegitimate punitive slap at Sinclair for engaging in the wholly protected defense of its rights. *See California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972). To avoid all these pitfalls, the Commission should issue the requested stay to ensure that it does not run afoul of the Court's rulings.

D. No Interested Party Would Suffer Harm if a Stay Were Granted

No interested party will be harmed by grant of Sinclair's stay request. Intervenors seeking to prevent the Court's judicial stay argued, and may argue again here, that a stay would somehow harm television viewers in general through supposed harms to the "marketplace of ideas and competition."[23] But the Court rejected those arguments, finding that Sinclair "met the stringent standards for stay." Stay Order in Case No. 01-1079 (D.C. Cir. Jun. 20, 2001). As with this earlier judicial stay, the grant of a similar stay by the Commission now will simply preserve the *status quo* until a reasonable time has passed for compliance with any ownership rules that may remain after the Commission's omnibus review.

E. The Public Interest Favors a Stay

The public interest will be served by granting the requested stay. As noted above , the Court rejected intervenors' arguments that a stay would somehow harm the interests of the viewing public. By granting a stay, the Court also rejected arguments that a stay would undermine the ability of the FCC to regulate and enforce its rules and orders.[24]

Instead, the Court made clear that the Commission's unjustified retention of the Rule violates Congress's clear policy directive, in Section 202(h) of the 1996 Act, incorporating "a presumption in favor of repealing or modifying the ownership rules," that was "designed to continue the process of deregulation." As Congress, and not the Commission, has the final word in determining the public interest, any Commission action that violates this presumption would clearly be contrary to the public interest. Any forced termination of the four LMAs, before the Commission finishes its omnibus review would effectively violate the will of Congress and, therefore, not serve the public interest.

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23 *See, e.g.,* Opposition of UCC, *et al.*, to the Emergency Motion for Stay of Sinclair Broadcasting Group, Inc., *Sinclair Broadcast Group v. FCC*, Case No. 01-1079 (filed Jun. 1, 2001) at 18-19.

24 *Id.* at 19-20.

IV. CONCLUSION

For the foregoing reasons, Sinclair respectfully requests that the Commission grant the requested stay.

Respectfully submitted,

SINCLAIR BROADCAST GROUP, INC.

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Dated: September 3, 2002

CERTIFICATE OF SERVICE

I, Joan Taylor, a secretary with the law firm Shaw Pittman LLP, hereby certify that a true and correct copy of the foregoing REQUEST BY SINCLAIR BROADCAST GROUP, INC. FOR STAY was sent by courier(*) or first class mail, this 3rd day of September 2002, to the following:

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EXHIBIT A – Declaration of David B. Amy

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Television Satellite Stations Review of Policy and Rules	))	MM Docket No. 87-8

DECLARATION OF DAVID B. AMY

Pursuant to 28 U.S.C. § 1746, David B. Amy, under penalty of perjury, states as follows:

1. The statements that I made in my declaration of May 4, 2001 continue to be true. Specifically, the following is true as of today:

2. I am currently Executive Vice President and Chief Financial Officer of Sinclair Broadcast Group, Inc., a position that I have held since March 2001. Prior to that time, I served as Executive Vice President of Sinclair since September 1999 and as Vice President and CFO of Sinclair since October 1994. In addition, I serve as Secretary of Sinclair Communications, Inc., the Sinclair subsidiary which owns and operates the broadcasting operations. Prior to this appointment, I served as Corporate Controller of Sinclair beginning in 1986. I have over sixteen years of broadcast experience.

3. I have personal knowledge of the facts stated in this declaration.

4. During the course of my duties at Sinclair, I have had extensive experience with local marketing agreements ("LMAs") and with the market for the acquisition of television stations in television markets of varying sizes.

5. Sinclair has entered into LMAs with the four following stations (among others); WRGT-TV, Channel 45, Dayton, Ohio; WTAT-TV, Channel 24, Charleston, South Carolina; WVAH-TV, Channel 11, Charleston, West Virginia; and WTTE(TV), Channel 28, Columbus,

Ohio. Under current Federal Communications Commission ("FCC") rules, Sinclair would have been forced to terminate at least three of these four LMAs by August 6, 2001.

6. Sinclair has invested millions of dollars in these stations to enable them to air quality programming, including local news and public affairs programs, and to institute improvements in their facilities.

7. Sinclair has instituted these changes based on the expectation that it will realize a return on its investment over the long term in the form of significant economies of scale. The LMAs to which Sinclair is a party have an initial term of at least five years with a five year renewal period. Sinclair determined that the ten year period of time was necessary in order to recoup the expenses involved and provide the company with a reasonable rate of return on its investment. The early termination of the LMAs will dramatically affect the economic restitution for Sinclair's investment in equipment and programming designed to enhance program diversity. Once its contractual relationships with these stations are terminated, Sinclair's prior investment will be dramatically affected. Even if Sinclair could resume its contractual relationships in the future, its loss in the interim of goodwill, market efficiencies and its investment could not be recouped. LMA opportunities are difficult to find in any particular market and irreplaceable in the ordinary course of business.

8. Each market and each television station within a market, with its particular audience reach and demographic niche, is unique. In my experience, if a station group were forced to terminate an LMA with a particular station, there would be relatively little likelihood that the group would be able to re-enter the market by doing a new LMA with that station or with a comparable one. Accordingly, the forced divestiture of the four LMAs would, in all likelihood,

permanently deprive Sinclair of a unique position in the market and exclude it from that position for all time.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 29th day of August, 2002.

David B. Amy